No. 49329-2-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

TAZMINA VERJEE-VAN and BRIAN VAN,

Appellants,

vs.

PIERCE COUNTY, acting through its Department of Planning and Land Services and Office of Pierce County Hearing Examiner,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 16-2-04323-8

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

All property owners, particularly those who live on waterfront with shorelines of statewide significance, are entitled to rely upon the local governing body to enforce land management regulations. In fact, one of the policies of the Shoreline Management Act of 1971 is to coordinate planning and construction to protect the public interest associated with the State shorelines. See RCW 90.58.020. One of the ways to insure this protection is to inform all entities about development and implementation of the Shoreline Management Act. See RCW 90.58.130. Most importantly, however, to insure compliance with the implementation, Pierce County is the steward of Pierce County waterfront development to make certain that property owners follow the building and development codes so that all property owners might peacefully enjoy their property. With respect to shoreline development, RCW 90.58.210(1) mandates that Pierce County shall take the appropriate legal action to enforce compliance with the shoreline development codes.

Here, simply stated, Pierce County has continuously refused to do what it is statutorily required to do in this case such that all three property owners, Borgert, Abercrombie and Verjee-Van/Van (hereafter Van) are treated similarly with respect to their waterfront property and waterfront lake access. Because Pierce County failed to do what it is mandated to do, the Vans respectfully urge this court to grant them the requested relief.

II. STATEMENT OF THE CASE

Petitioners reply upon the procedural history and objections to findings and conclusions as set forth in the opening brief.

Additionally, although Borgert and Abercrombie reference a 2007 administrative hearing, such hearing did not address the legality of the Borgert pier. See RP 468-79. Further, the settlement agreement referred to by Borgert/Abercrombie allowed appellants to adjudicate issues of setbacks, lateral lines, and shoreline permitting requirements related to appellants' shoreline access (CP 493). Finally, with respect to any alleged violation of the settlement agreement, no such violation is before this court.

In Administrative Appeal No. AA7-14, the Hearing Examiner determined the Vans' lateral lines and where they are located. No party appealed this decision. Now that the lateral lines have been appropriately recognized, their location clearly shows that the Borgert pier encroaches upon appellants' water access. CP 254-264. Respectfully, the Vans do not want to lose the Lake Tapps water access that was granted to them in No. AA7-14. Although the Vans believe that Mr. Borgert may be entitled to a pier, his pier must remain in his access area on Lake Tapps and also must comply with the same code and/or statutory requirements that apply to the Vans.

III. ARGUMENT

The gravamen of this appeal surrounds the legality of the Borgert pier and whether the Borgert pier complies with the Shoreline Management Act (SMA) and the Shoreline Master Program (SMP). Based on the lateral lines established in Administrative Appeal AA7-14, the Borgert pier clearly encroaches on the appellants' water access to Lake Tapps. The Hearing Examiner's decision relies upon his finding that the Borgert pier, and its location, cannot be challenged.

The County, Borgert and Abercrombie argue that because the County engaged in "some" process surrounding the approval of the Borgert pier, it, therefore, must be lawful. They also

argue that a final decision was rendered related to the Borgert pier. Nothing could be further from the truth.

On pages 14-15 of the County's brief, the County outlines the chronology for the "permitting" of the Borgert pier. Based upon that chronology, the County, Borgert and Abercrombie urge that a final decision was rendered that was not timely appealed.

As set forth within petitioners' opening brief, the Pierce County Code sets forth what must occur before any person may develop within Pierce County. The language is mandatory: "the property owner or authorized agent shall obtain applicable permits and approvals prior to commencing develop." Pierce County Code 18.30.020.

The County, as well as Borgert and Abercrombie, rely upon the writing of the DNS as the cornerstone of its argument that a final decision was rendered that was not timely appealed. See County's brief at 19-20.

With respect to the issuance of a DNS, WAC 197-11-340(2)(d) states as follows: "The date of issue for the DNS is the date the DNS is sent to the department of ecology and agencies with jurisdiction and is made publicly available." Per this WAC, the County cannot make a final decision on a DNS. Only the Department of Ecology has this authority.

Nowhere in the County's chronology, as relied upon by the Hearing Examiner, was the DNS ever sent to the Department of Ecology for its review. Rather, the last date noted is June 20, 2001, when the County wrote that it "issued" and "finalized" the DNS. This is a legal impossibility.

In the DNS issued by Adonais Clark, he indicated that

> The issuance of this Determination of Nonsignificance does not constitute project approval. The applicant must comply with all other applicable requirements of Pierce County Departments and other agencies with jurisdiction prior to receiving construction permits.

CP 276-77.

Here, after the DNS was written, no further action was taken by the County and the County presented no evidence at the hearing to overcome the deficiency. Significantly, a County determination of nonsignificance (DNS) under SEPA must also be sent to affected Indian Tribes. An approval of a shoreline substantial development permit where this is not done must be reversed. See Southpoint Coalition v. Jefferson County, SHB No. 86-47[1]. Here, clearly the pier is issued in violation of the PCC, pertinent WACs, and it is illegal. Contrary to all respondents' arguments, no final decision has ever been rendered. As such, petitioners have not missed the appeal timeline.

No evidence exists that the County followed WAC 197-11-340(2)(d). Although it is clear that the Borgert pier was constructed, what is also clear is that it was not constructed lawfully nor was the County's "final decision" ever sent to the Department of Ecology or was a DNS issued by the Department of Ecology that would necessitate the starting of the timeline in which to appeal. See RCW 90.58.140(6). See also Buechel v. State Dept. of Ecology, 125 Wn.2d 196, 203-05, 884 P.2d 910 (1994). As also set forth within petitioners' opening brief, and pursuant to Pierce County Code 18.140.030(c) noncompliance with the code causes a project to be null and void.

A permit issued without consideration of environmental factors, and, therefore, being in violation of SEPA, is null and void. Ball v. City of Port Angeles and Port of Port Angeles, SHB No. 107[2]. Compliance with SEPA is required prior to permit issuance. Brachbogel, et al. v.

[1] This case is attached to appellants' opening brief.
[2] This case is attached to appellants' opening brief.

Mason County & Tawanah Falls Beach Club, Inc., SHB No. 45[3]. Because of noncompliance by the predecessors to Mr. Borgert, the pier is null and void.

On page 20 of Pierce County's brief, the County states that "any alleged defects involving the building permit, the shoreline exemption letter, or the determination of non-significance (DNS), could have been remedied, or permits could have been revoked or modified." The County is absolutely correct in this statement had the County adhered to its requirements pursuant to RCW 90.58.210(c) and followed the requirements outlined in WAC 197-11-340(2)(d).

Had the County submitted its determination of a DNS to the Department of Ecology, which is required, the Department of Ecology, and other entities with jurisdiction, would have had an opportunity to review the County's action. By failing, or intentionally refusing, to submit the DNS to the Department of Ecology, the County, unilaterally, made a decision that severely impacts the Vans' use of their property. But because the County did not send, by certified mail (see RCW 90.58.140(6), the DNS to the Department of Ecology, the defects, which are significant, were not reviewed by the Department of Ecology. Had this notice been sent, the glaring deficiencies would have been highlighted by the Department of Ecology, and the County and Mr. Borgert/Winne would have been required to correct all deficiencies before the project could be approved. Ignorance to what is required is simply insufficient to authorize construction in violation of applicable land use restrictions. See Labusohr v. King County, SHB 84-62[4].

Further, the footnote recitation by the County on page 20 of its brief regarding the publication highlights the County's failure to shepherd this development. The publication referenced only lasted for a week and the notice was published in the Eatonville local paper, not

[3] This case is attached to appellants' opening brief.
[4] This case is attached as an appendix to this reply brief.

the local paper in the area where the project was located. See Pierce County Code 18.80.030, .040 and see CP 425 in appeal no. 48947-3-II. See also Save Flounder Bay v. Mousel, SHB No. 81-15[5]. How this constitutes proper notice to the public is not explained.

Borgert and Abercrombie focus on the aspect that "a principal purpose of the SMA is safeguarding the public's rights and the State's navigable waters" citing RCW 90.58.020. See Borgert and Abercrombie brief at 13. Although that is "a" purpose, the principal purpose is to insure uniform development along the shorelines. Had the County exercised its mandatory authority pursuant to RCW 90.58.210(1) to make certain that the Borgert pier complied with the SMA and SVR, no navigable issue would exist because the Borgert pier would not be located in the Vans' access area. Although Abercrombie and Borgert suggest that "there is substantial evidence to support the examiner's findings that petitioners' dock impairs navigation", the "substantial evidence" relied upon is that the placement of the Borgert pier in the Vans' access area causes a navigation issue.

A. The Doctrine of Res Judicata Does Not Bar Petitioners' LUPA.

Borgert and Abercrombie argue that this Court's ruling in Van v. Pierce County, Pierce County Cause No. 14-2-09794-3, bars review of this LUPA asserting that the lawfulness of the Borgert pier was expressly at issue in the prior case. Petitioners sought a writ of mandamus from the Superior Court to direct the County to uniformly apply the PCC and the Shoreline Management Act to not only the Van pier but also the Borgert pier. The trial court declined to issue said writ, which ruling is under appeal in No. 48947-3-II.

Borgert and Abercrombie cite Hilltop Terrace Homeowners Assoc. v. Island County, 126 Wn.2d 22, 891 P.2d 29 (1995) in support of their contention. Respectfully, however, that case

[5] This case is attached to appellants' opening brief.

allows this appeal because the subject matter of the two cases differs as Van v. Pierce County, supra, was a petition for a writ of mandamus asking the Court to require the County to uniformly apply the Shoreline Management Act (SMA), Shoreline Master Plan (SMP) and SEPA to the Borgert pier. Vans' LUPA challenges the conditions imposed by PALS, which were upheld by the Hearing Examiner. Although the Hearing Examiner ruled on finality of the Borgert pier, as all parties are aware, in the Vans' appeal in Administrating Hearing AA7-14, the Hearing Examiner established the lateral lines that finally recognized the Vans ingress/egress access to Lake Tapps. The establishment of the lateral lines, which no party appealed, establishes that the Borgert pier encroaches upon Vans' ingress and egress. This is a substantially different subject matter that the trial court did not address in Van v. Pierce County, supra, as the trial court did not have the benefit of the Hearing Examiner's decision in AA7-14 which established the Vans' lateral lines.

"*Res judicata* occurs when a prior judgment has a concurrence of identity in full respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." Hilltop Terrace Homeowners, 891 P.2d 35. With respect to "subject matters, they are not 'identical' if they differ substantially." Id.

In Hilltop Terrace, homeowners appealed the approval of a second application for a cellular and microwave tower that they urged was similar to a first tower that had been denied. The court, in addressing the *res judicata* issue, found that in order for the doctrine to apply, "a second application may be considered if there's a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself." Id. at 891 P.2d 35.

Here, the subject matters are different as the prior Van case considered whether a writ of mandamus was appropriate to require the County to act. Here, the issue of finality surrounding the Borgert pier must be addressed with the added information that the Hearing Examiner determined the lateral lines within the cove, which lines mark the access areas for all property owners in the cove. See CP 254-64. The Court needs to address the finality issue with this additional information as it is substantially different from the writ of mandamus case. As such, *res judicata* does not bar petitioners' LUPA.

B. The County's Action Constitutes a Taking.

As set forth within petitioners' opening brief, the Hearing Examiner took away the petitioners' private ingress and egress rights that he had established in Appeal AA7-14, and granted these rights to Mr. Borgert. The County asserts such action does not constitute a taking because no part of petitioners' property was located on Lake Tapps. Rather the pier is located on property owned by Cascade Water Alliance. Such argument is not persuasive.

In the deed that grants the Lake Tapps Development Company access to Lake Tapps from Puget Sound Power and Light, (predecessor to CWA), the deed authorizes property owners the right to construct docks on Lake Tapps to give the landowners water access. See Exhibit AR 146. Severely eliminating petitioners' water access, without due process, constitutes an unconstitutional and unlawful taking. See Manufactured Housing Communities of Washington v. State of Washington, 142 Wn.2d 347, 13 P.3d 183 (2000).

In Manufactured Housing, an association of mobile home park owners commenced a declaratory judgment action asserting that RCW 59.23.005 constituted an unlawful taking in violation of Article 1, § 16 of the Washington State Constitution. The statute authorized mobile home park tenants a right of first refusal when the mobile home park owner decided to sell a

mobile home park. The park owners contended that 59.23 RCW "eviscerated fundamentally important ownership rights." Manufactured Housing, 142 Wn.2d at 353. The Supreme Court reviewed the state and federal constitutions surrounding regulatory takings and ultimately determined that "the statutory grant of a right of first refusal to the tenants of mobile home parks amounts to a taking and transfer of private property without a judicial determination of public necessity and without just compensation having been first paid as required by . . . Article 1, § 16." Id. at 374. As such, the court declared that said statute was unconstitutional.

Here, the Hearing Examiner's ruling is an unconstitutional taking because it takes the private property of the Vans and grants it as private property for Mr. Borgert. The Vans' water access is a property interest they enjoy and possess through the rights of their title and deed, which was determined in appeal AA7-14. The Hearing Examiner's ruling that allows the Borgert pier to remain in petitioners' ingress and egress takes away, without due process, that property right belonging to the Vans. As such, a taking has occurred.

IV. CONCLUSION

Pierce County not only has tremendous authority, but it also has tremendous responsibilities, related to development along public shorelines. If the County refuses to enforce the Shoreline Management Act, private land owners have no choice but to seek relief in the superior court, and as here, the appellate court, to protect their property rights.

Like all landowners, appellants are lawfully entitled to use the property they lawfully purchased, to quietly enjoy their property, and to expect that the County will act lawfully in the development of Pierce County shorelines. Unfortunately, the County's actions, and the Hearing Officer's decision, has substantially damaged this right.

Based upon the County's refusal to apply the same laws to the Borgert pier as were applied to the Van pier, appellants were wrongfully denied their exemption. Accordingly, the Hearing Examiner's Findings of Fact, Conclusions of Law and Decision are clearly erroneous based upon the record below.

Respectfully, appellants urge this Court to reverse the Hearing Examiner's decision, and remand it with directions to grant appellants' appeal as they have satisfied all exemption requirements.

V. APPENDIX

A-083 Labusohr v. King County, SHB 84-62

DATED THIS 1st day of June, 2017.

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Attorneys for Appellants

By: _____
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington this 1st day of June, 2017.

Kathy Herbstler

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE SUBSTANTIAL DEVELOPMENT AND VARIANCE PERMIT DENIED BY KING COUNTY TO JEAN L. R. LABUSOHR, JEAN L. R. LABUSOHR, Appellant, v. KING COUNTY and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 84-62 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the denial of a shoreline substantial development and variance permit for a single-family residential dock on Lake Margaret came before the Shorelines Hearings Board for hearing in Duvall, Washington, on July 19, 1985. Sitting as the Board were Wick Dufford (presiding); Lawrence J. Faulk, Chairman; Gayle Rothrock, Nancy R. Burnett, Rodney M. Kerslake, and Les Eldridge, Members.

Appellant Labusohr was represented by Gary A. Jacobson of Maas and

Lantz, P.S. Respondent King County was represented by Phyllis K. Macleod, Deputy Prosecuting Attorney. The Department of Ecology did not appear. Bibi Carter of Gene Barker and Associates recorded the proceedings.

A pre-hearing conference was held on February 22, 1985, resulting in an order governing further proceedings. The Board conducted a site visit on the day of the hearing.

Witnesses were sworn and examined; exhibits were offered and admitted. Arguments were made, the final brief being received on August 26, 1985. From the contentions, testimony and exhibits, the Board comes to these

FINDINGS OF FACT

I

Lake Margaret is located in King County, a governmental subdivision of the state which implements and enforces the Shoreline Management Act within its area of jurisdiction. The County has adopted a shorelines master program, codified in Title 25 of the King County Code (KCC), of which we take official notice. The Lake Margaret area has a rural designation for shorelines purposes.

II

Lake Margaret is a natural body of water, enlarged to function as a reservoir by the construction of an outlet dam. It lies about four and one-half miles north of the town of Duvall. The lake drains via Margaret Creek to the Snoqualmie River. For flood control purposes the lake level is lowered during the winter months. The level is then

raised during the relatively dry period of late spring and summer. The vertical variation in water elevation is from 3 to 5 feet. The shoreline of the lake has been extensively developed in single-family residential uses.

The lake level is regulated, pursuant to directions from the State Department of Ecology, by the Lake Margaret Community Purposes Club, an organization of residents and land owners which, by virtue of covenants, adopts and enforces certain regulations affecting land use.

III

This case arises from contrasting uses of neighboring lakefront lots--Lots 50 and 51. The focus of the dispute is a water access structure built on pilings, which we will refer to as a pier. It is located within inches of the property line between the two lots.

IV

The lakefront lots along the shores of Lake Margaret extend some distance into the bed of the lake from the line of ordinary high water. The shoreline along Lots 45 through 51 describes a small cove. Lot 50's bulkheaded shoreline runs roughly west to east for about 65 feet along the innermost intrusion of this cove; then, the land juts southerly back into the lake along a peninsula. The waterward extension of the eastern lot line of Lot 50 alternately touches and parallels this peninsula. Lot 51, adjacent on the east, includes the entire length of this peninsula. The precise boundary between Lots 50 and 51 has been the subject of dispute.

V

The lake bed in front of Lot 50 is very shallow. In the summer high water period, the depth is only from 18 to 24 inches. When the lake is drawn down the water recedes from the bulkhead 80 feet or more. The draw down exposes a large spring in the lake bottom directly in front of Lot 50's bulkhead. The lake bed in the vicinity of this spring is extremely soft; persons attempting to walk or wade through it sink several feet into the muck and have found the area impassable by such means. The maximum depth of the yielding mud is unknown.

VI

Appellant, Jean L. R. Labusohr, is the owner of Lot 50 on which is located a substantial house where he and his wife permanently reside. He purchased the property in 1979 and since that time has constructed numerous improvements, including a stone bulkhead, terracing and landscaping, and the pier which is the subject of this appeal.

Mr. Labusohr is an active member of the Lake Margaret Community Purposes Club having served as both its water commissioner and its president.

VII

Lot 51, to a large degree, remains undeveloped. It is heavily treed and covered with undergrowth. Its owner has left its shores largely alone, unmanicured, not bulkheaded. The natural appearance of this lot contrasts with the lawn and landscaping of the adjacent Lot 50.

VIII

Ruby Weisser purchased Lot 51 in 1958. She has never resided on the property. Over the years her primary use of the parcel has been recreational, as a place to get away to, for picnics, for swimming. She has left it in its natural state because she likes it that way.

In 1980 a mobile home was put on the upland portion of the property; it is not readily visible from the waterfront. Ms. Weisser rents this mobile home. She has not been an active participant in the Lake Margaret Community Purposes Club. Indeed, she has been in some conflict with the organization over domestic water supply and mobile home regulations.

IX

In early 1983, Mr. Labusohr built the pier at issue. It consists of decking supported by permanent pilings commencing on land near the east end of his bulkhead and extending southerly near the edge of the peninsula for over 100 feet. Then it angles southwesterly and waterward perhaps another 20 feet. This structure is four feet wide and elevated above water level about 17 inches. When the lake is raised, part of the pier is over water and part is over land. Seventy-seven (77) linear feet, with 443 square feet of surface area, are over water.

At the waterward end of the pier a float is attached and to this small boats may be moored. In the low water period no part of the entire structure, including the float, reaches the water.

X

Prior to constructing the pier Labusohr neither applied for nor received any permit from King County under the Shoreline Management Act.

XI

In the summer of 1983, after the pier was in place, Ms. Weisser on a visit to her lot observed it and became concerned. She thought it encroached on her property.

The matter came to the attention of King County whose officials advised Mr. Labusohr that he needed approval for the structure under the Shorelines Act. Application for a shoreline substantial development permit was filed on October 12, 1983. A shoreline variance was sought on January 25, 1984.

Pursuant to these applications, a county inspector visited the site in the spring of 1984. His report on April 9, 1984, recommended approval. A public hearing was held before a shoreline hearing officer for the County on April 24, 1984. The hearing officer, in his decision dated November 19, 1984, denied both the shoreline substantial development permit and the shoreline variance, largely on the grounds that the pier reduced lake access from Lot 51.

On November 30, 1984, Mr. Labusohr filed his request for review of these denials with this Board.

XII

Before the pier was built, the west coast of the peninsula was overgrown with blackberries, cattails, and marsh grasses. The area

served as a trap for driftwood and debris which washed into the cove.

The area under the present pier was cleaned out with a back hoe before the pilings were set in. Now the area supports little vegetation, except for a few clumps of grass.

The pier structure itself is well-built and attractive. Neighbors with views oriented toward the pier testified that they thought it has improved the appearance of the cove.

XIII

Area residents who testified said they had never seen the west side of the peninsula used as access to the lake for swimming or boating from Lot 51. However, Ms. Weisser advised that, despite the thick vegetation, she has frequently over the years used that side of her property for swimming access at night.

The more usual access point for recreational use of the lake from Lot 51, however, is the south end of the peninsula which is unaffected by the existence of the pier. Moreover, the pier itself, because it is so close to the water level, does not impose much of a physical barrier to access from the peninsula. It would appear no more difficult to climb over the pier than it used to be to climb through the blackberries and cattails.

The access problem, if there is one, is therefore not a physical problem but a legal one. Appellant has built no fence. Assuming the pier is on appellant's property, the difficulty is one of trespass on the structure itself.

XIV

The purpose of the pier is to provide an easy means for bypassing the mire around the lake-bottom springs enroute to boating and swimming. However, no need was shown for this long and substantial structure during the prime recreation period in the summer when the waters of the lake, though shallow, lap at the Labusohr's bulkhead.

Though evidence did show that at periods of low water most other properties on the lake have direct access to the water from much shorter and less elaborate docks, no showing was made that the entire lake bottom in front of the Lot 51 bulkhead is impassable in winter, absent the existence of this pier.

XV

Mr. Labusohr, while the pier was being built, told Ms. Weisser's renters that they could use it if they helped build it. A renter assisted with the first four piling holes and, then, never returned. This was the total extent to which a joint-use pier was investigated. Mr. Labusohr did not explore joint use either with Ms. Weisser or with the owner on the other side of his property to the west.

Further, he decided unilaterally and without explanation that construction of the pier was necessary before a moorage float could be used.

XVI

Mr. Labusohr stated that he located the pier against the peninsula because this was the only solid ground where he could set in piling. Yet, no one explained why, if the ground is so solid in this location,

a pier is needed in order to cross it when the lake is down.

Additionally, the evidence fell short of proving that the four-foot wide strip selected near the property line was the sole location where such a structure could be constructed. There was no engineering investigation to evaluate the feasibility of constructing a pier across or nearer to the spring area. Such a structure would doubtless be more costly, but it was not shown to be either impossible or impracticable to build.

XVII

There was an assertion that shorelines permits were not obtained for the other smaller docks used by residents around Lake Margaret. There was, however, no evidence as to which, if any, of these docks were constructed prior to enactment of the Shoreline Act and which, if any, are more recent. Moreover, no evidence as to the cost of any of these docks was introduced.

XVIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

We review the permit decisions of King County for consistency with the provisions of the applicable master program and the provisions of the Shoreline Management Act (SMA). RCW 90.58.140(2)(b). No contention is made that the policies of the SMA itself have directly

been violated, so we restrict our evaluation to the propriety of the County's action under the approved master program, Title 25 KCC.

II

This case involves a familiar and always troubling problem--what to do about a development which was built without prior benefit of the permit process.

Of course, the difficulty posed by the existence of the structure in question might have been avoided if an application under the SMA had been received and ruled on before the construction.

Now after the fact, appellant's ignorance of permit requirements cannot serve to authorize construction in violation of applicable land use restrictions. Otherwise the SMA would effectively be repealed as to any citizen who was unaware of its requirements. Cf. J & B Development Co. v. King County, 29 Wn. App. 942, 631 P.2d 1002 (1981) (Setback restriction applied notwithstanding erroneous building permit.)

Accordingly, even though we are dealing with a development already in being, no special equities are presented for our consideration.

III

This Board's jurisdiction does not extend to constitutional questions and, therefore, we decline to rule on appellant's equal protection assertion. See Yakima County Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1976). We note, however, that previous nonenforcement in land use matters does not raise an estoppel to subsequent enforcement. Mercer Island v. Steinman, 9

Wn.App. 513 P.2d 80 (1973).

IV

Appellant argues that the structure in question is not a "pier" as defined by the master program, but rather is a "walkway," a term which is not defined.

Under KCC 25.08.370 "pier" or "dock" means

> a structure built in or over or floating upon the water extending from the shore, which may be used as a landing place for marine transport or for air or water craft or recreational activities.

We conclude that, under the rule of liberal construction (RCW 90.58.900), appellant's development falls within this definition.

For most of its length it is a single construct. It is designed to provide over-water passage at times of high lake level. Its object is improved water access for recreation. A substantial portion, though not all of it, is over water during the summer. Under such conditions we believe that the entire unitary structure must be classified as a "pier" or "dock."

That the inundation of the site is only periodic does not affect our conclusion. Such is the situation for piers in tidal areas, yet the terminology is thought appropriate.

V

As a pier in rural environment, appellant's development is subject to the same requirements as a pier in an urban environment, KCC 25.20.090(C).

Whether the use itself is permitted is governed by KCC 25.16.140. That section states, in pertinent part:

> Piers, moorages, floats or launching facilities may be permitted accessory to a single-family residence, provided:
>
> A. Private, single residence piers for the sole use of the property owner shall not be considered an outright use on King County shorelines. A pier may be allowed when the applicant has demonstrated a need for moorage and that the following alternatives have been investigated and are not available or feasible:
>
> 1. Commercial or marina moorage;
> 2. Floating moorage buoys;
> 3. Joint use moorage pier.

VI

We conclude that the requirements of KCC 25.16.140 have not been met in this case. Appellant did not demonstrate a need for the sizeable structure he built in any condition of lake level, high or low. The pier is a convenience, not a necessity, for water access.

Moreover, the required investigation of alternatives was not conducted. Although commercial or marina moorage is not appropriate to the kind of recreation enjoyed on this small residential lake, neither a float nor a joint-use pier were shown to be unavailable or infeasible options.

Therefore, the denial of the substantial development permit was proper.

VII

The applicable side line setback requirements are set forth in KCC 25.16.120(C). That subsection states:

> C. No pier, moorage, float or overwater structure or device shall be located closer than fifteen feet from the side property line extended, except that such structures may abut property lines for the common use of adjacent property owners when mutually agreed to by the property owners in a contract recorded with the King County Division of Records and Elections, a

> copy of which must accompany an application for a building permit or a shoreline permit; such joint use piers may be permitted up to twice the surface area allowed by this title. (Emphasis added.)

The structure under consideration is well inside the fifteen foot setback area. Thus, a variance would be needed even if it were otherwise permitted.

We note that this would be the case whether or not the development is classified as a "pier." It is an "overwater structure." The setback applies to such an accessory to residential development in a rural environment through incorporation by KCC 25.20.090(B).

VIII

KCC 25.32.040 makes the provisions of WAC 173-14-150 applicable to the issuance of variances. The latter states, in pertinent part:

> The purpose of a variance permit is strictly limited to granting relief to specific bulk, dimensional or performance standards set forth in the applicable master program where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the master program would impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020.
>
> (1) Variance permits should be granted in a circumstance where denial of the permit would result in a thwarting of the policy enumerated in RCW 980.58.020. In all instances extraordinary circumstances should be shown and the public interest shall suffer no substantial detrimental effect.
>
> ...
>
> (3) Variance permits for development that will be located either waterward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030(2)(b), or within marshes, bogs, or swamps as designated by the department pursuant to chapter 173-22 WAC, may be authorized provided the applicant can demonstrate all of the following:
>
> (a) That the strict application of the bulk, dimensional or performance standards set forth in the

applicable master program precludes a reasonable use of the property not otherwise prohibited by the master program.

(b) That the hardship described in WAC 173-14-150(3)(a) above is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions.

(c) That the design of the project will be compatible wth other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment designation.

(d) That the requested variance will not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief.

(e) That the public rights of navigation and use of the shorelines will not be adversely affected by the granting of the variance.

(f) That the public interest will suffer no substantial detrimental effect.

IX

We conclude that the appellant's development failed to meet the requirements for a variance from the setback requirements.

The inability to build the pier at the location selected was not shown to "preclude a reasonable use of the property not otherwise prohibited by the master program." The structure is a considerable amenity, but it was not demonstrated that water recreation could not be enjoyed on the property either without the pier or with it in another location.

Moreover, it was not proven that the pier could not feasibly be located elsewhere on the property, nor that the location at or near the property line is the "minimum necessary to afford relief."

X

Our decision on the variance does not rest on "adverse effects to adjacent properties." We do not believe that water access from Lot 51 is significantly restricted given the configuration of that lot and the topography of the lake bottom. Further, we enter no conclusion on the issue of where the property line is located. This Board cannot quiet title to real property. Plimpton v. King County, SHB 82-23 (January 14, 1985). In the event (which we think unlikely) Ms. Weisser were to prove that the pier encroaches on her land, appellant would simply have another legal problem to add to the difficulties already identified under shorelines law.

XI

The criteria of the master program as applied to this case are strict and clear. However, the result we reach does not necessarily mean that the pier cannot be authorized. The obvious solution is a joint-use pier. This would not require a setback variance[1] and is one of the alternatives explicitly noted in KCC 25.16.140.

The neighboring land owners differ over how they use their properties. Nonetheless, we are not convinced that a joint-use agreement restricted and conditioned to satisfy the interests of both

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1. It is unclear to us what bulk and length criteria apply to joint-use piers under the master program. However, the bulk and length criteria for single-family piers may not be violated by this structure, if length can be measured by distance from shore and bulk can be calculated by the overwater portion of the structure only. See KCC 25.16.140.

could not be worked out.

We, of course, cannot compel an accommodation of differing interests. We can, however, point out that other avenues have not succeeded and cooperation has not been seriously attempted.

XII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The denial of King County to appellant of a substantial development permit and variance permit under the Shoreline Management Act is affirmed.

DONE this 12th day of November, 1985.

SHORELINES HEARINGS BOARD

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11/8/85

LAWRENCE J. FAULK, Chairman

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